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THE DANGER OF DEMOCRACY'S SELF-DOUBT

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What if a candidate actually won enough voters to win an election, but not enough voters believed in the authenticity of the outcome to permit the winner to govern effectually as a result of that electoral mandate?

As this symposium heads to the printer midsummer of 2020, just about when the nation celebrates Independence Day, this question is a reasonable one to ask. Vice President Biden has recently opened up a formidable lead in public opinion polls,¹ one that easily could dissipate before November to be sure, but still suggesting he could defeat President Trump's bid for reelection. At the same time, however, Biden's win—if it occurs—would likely depend on the casting and counting of mailed ballots, ballots which Attorney General Barr has pronounced as inherently unreliable and subject to foreign counterfeiting.² If the Attorney General is successful in persuading close to half the country that a Biden victory is intrinsically dubious insofar as it rests on mailed ballots, he would have immediately shredded the forty-sixth president's mantle of authority even before Inauguration Day.

After 2016, and heading into 2020, experts in election law had expected another orchestrated disinformation campaign from foreign adversaries, including Russia, designed to sow distrust among American citizens in the capacity of their voting procedures to correctly identify the winner whom the voters wanted. Experts even expected some copycat domestic actors to replicate the kind of disinformation tactics perpetrated by Russian operatives.³ Given President Trump's own disconnection from reality of the topic of voter fraud, evidenced by his wholly preposterous claim that millions of

¹ Geoffrey Skelley, *Biden Has A Historically Large Lead Over Trump, But It Could Disappear*, FIVETHIRTYEIGHT (Jun. 25, 2020, 6:00 AM), <https://fivethirtyeight.com/features/biden-has-a-historically-large-lead-over-trump-but-it-could-disappear/> [<https://perma.cc/7LLH-UMU3>].

² Barr NPR interview Transcript: NPR's Full Interview with Attorney General William Barr, NPR (Jun. 25, 2020, 6:07 PM), <https://www.npr.org/2020/06/25/883273933/transcript-nprs-full-interview-with-attorney-general-william-barr> [<https://perma.cc/XJM5-CJF5>].

³ RICHARD L. HASEN, ELECTION MELTDOWN (2020).

fraudulent votes tainted his own 2016 victory,⁴ it is not altogether surprising (although obviously disappointing) that the sitting president as part of his own reelection effort would fabricate spurious assertions about the untrustworthy nature of vote-by-mail. But few would have predicted that an Attorney General of the United States, with a responsibility to truth and evidence as the foremost law enforcement officer in the land, would spread falsehoods about how voting by mail operates and the degree to which it is susceptible to undetected large-scale manipulation.⁵ (This point is not to deny that fraud sometimes occurs with vote by mail, which is indeed more susceptible to misconduct than in-person voting, but it is egregiously irresponsible and incorrect to suggest that all mailed ballots should be stamped with a mark of suspicion.⁶)

The most basic concept at the heart of democracy is the one articulated in the Declaration of Independence: governments derive their just powers from the consent of the governed. This consent is secured periodically through free and fair elections, where the governed get to choose who will exercise the coercive power of the state over their liberty, property, and lives. The system cannot work, however, if this consent cannot be secured because the mechanisms of electing officeholders is so inherently unreliable that the results are meaningless as representations of the popular will.

Attorney General Barr's wholesale attack on vote by mail is so troublesome because it signals a willingness to deploy the federal Department of Justice in a way that would cripple the ability to conduct an election that in accordance with the expectation that the public should accept the election's results as reflecting the true will of the electorate—and therefore serving as the basis upon which the

⁴ *Id.*

⁵ Trevor Potter, *Trump and Barr Make Baseless and Harmful Claims About Mail-In Ballot Fraud*, FOX NEWS (Jun. 27, 2020), <https://www.foxnews.com/opinion/trevor-potter-trump-and-barr-making-baseless-and-harmful-claims-about-mail-in-ballot-fraud>. [<https://perma.cc/2KL8-M6BG>].

⁶ EDWARD FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* (2015).

government is entitled to exercise its coercive power. Historically, the federal Department of Justice has been an instrument of advancing the ideal that elections genuinely reflect the will of the eligible electorate. But in 2020 all is topsy-turvy, and there are serious fears that genuine democracy—where governments rule based on the electorate’s preferences—will not survive the November election intact.⁷

There are actually two analytically distinct challenges confronting the practice of American democracy this year, both well-represented in this symposium’s stellar and most timely collection of essays. One is the concern, made ever more pressing by the Covid-19 pandemic, that America lacks adequate infrastructure for actually identifying the electoral choices that the voters wish to make. Nate Persily, in his keynote, leads the symposium off with an exemplary distillation of the acute logistical hurdles imposed by holding elections in the midst of the pandemic.⁸ Dan Wallach, for his contribution, addresses a more specific but hugely important issue: whether the new form of voting technology known as “a ballot marking device” is adequately secure from attack.⁹

Other contributions to this symposium address an analytically different threat: even if America has adequate infrastructure with which to make a genuine electoral choice, disinformation will prevent us from using it effectively to make that kind of choice. Bill Marshall tackles one aspect of this problem: false information about voting procedures, so that voters fail to cast the ballots that is their right.¹⁰ Stephen Pettigrew and Charles Stewart, in their joint paper, address a different—and perhaps particularly frightening—dimension of this problem: the possibility that a carefully crafted and timed attack could

⁷ Edward Luce, *Could This Election Capsize America?*, FT SWAMP NOTES (June 26, 2020), <https://www.ft.com/swamp-notes> [<https://perma.cc/2FS4-TEKB>].

⁸ Nathaniel Persily, *The Virus and the Vote: How to Prevent the Infection of Our Election*, 16 OHIO ST. TECH. L. J. 473 (2020).

⁹ Daniel Wallach, *On The Security of Ballot Marking Devices*, 16 OHIO ST. TECH. L. J. 558 (2020).

¹⁰ William Marshall, *Internet Service Provider Liability For Disseminating False Information About Voting Requirements And Procedures*, 16 OHIO ST. TECH. L. J. 669 (2020).

confuse voters on Election Night about what choice they had actually made, so that even if the truth emerged subsequently, severe and lasting damage to public understanding would already have been done.¹¹

Four of the symposium papers consider the problem of disinformation more broadly—disinformation that can affect public attitudes about a candidate or issue, not just about the casting and counting of votes. Daniel Kreiss and Bridgett Barrett, in their joint essay, ambitiously offer a plan for the federal government to hold all social media companies to a common set of standards in the interest of fostering democratic accountability.¹² Abby Wood, with similar accountability objectives but a more pragmatic means of implementation, shows how the social media companies themselves could facilitate counter-speech by appropriate regulation.¹³ Yasmin Dawood, drawing on Canada's experience, explains how a hybrid approach that combines public and private components is most likely to counteract the pernicious effects of disinformation on social media.¹⁴ Finally, focusing on the kind of foreign attack that occurred in 2016, Ellen Weintraub offers ways to defend against the same sort of attack again.¹⁵

These essays all share the mission of salvaging American democracy from the onslaught of threats it currently faces, so that it can serve its essential purpose of providing a government deriving its just powers from the consent of the governed. In 2021, as these and other scholars building on this work look back, what will be their assessment? Was democracy successfully salvaged? Even if it was in some basic operational sense, was it perceived by the public to be fundamentally

¹¹ Stephen Pettigrew & Charles Stewart III, *Protecting the Perilous Path of Election Returns: From the Precinct to the News*, 16 OHIO ST. TECH. L. J. 587 (2020).

¹² Daniel Kreiss & Bridgett Barrett, *Democratic Tradeoffs: Platforms and Political Advertising*, 16 OHIO ST. TECH. L. J. 493 (2020).

¹³ Abigail Wood, *Facilitating Accountability For Online Political Advertisements*, 16 OHIO ST. TECH. L. J. 520 (2020).

¹⁴ Yasmin Dawood, *Protecting Elections From Disinformation: A Multifaceted Public-Private Approach to Social Media and Democratic Speech*, 16 OHIO ST. TECH. L. J. 639 (2020).

¹⁵ Ellen Weintraub & Carlos Valdivia, *Strike & Share: Combating Foreign Influence Campaigns On Social Media*, 16 OHIO ST. TECH. L. J. 701 (2020).

undermined, a perception which if it takes hold is tantamount to actually undermining its operation?

If democracy fails this year, it will be despite the efforts, ideas, and alarms these essays offer with great force and urgency. And if democracy succeeds despite all the attacks upon it, it may be in part because these essays play a role in protecting the process of self-government from those who endeavor to undermine it. That would be no small thing. And while we cannot now pronounce what the end result will be, we can say that this symposium has done its best to achieve its noble purpose.